1954

Shirlee S. Scrivener v. Albert Scrivener : Brief of Respondents

Utah Supreme Court

Rich & Strong; Attorneys for Respondents;

Case No. 8186

IN THE SUPREME COURT of the STATE OF UTAH

In the Matter of the Estate of KENNETH G. SCRIVENER,

Deceased.

SHIRLEY S. SCRIVENER, Executrix of the Estate of Kenneth G. Scrivener, Deceased,

Appellant,

vs.

ALBERT SCRIVENER and MRS. ALBERT SCRIVENER, as Trustees for Gregory Scrivener, a Minor,

Respondents.

BRIEF OF RESPONDENTS

RICH & STRONG,
Attorneys for Respondents.

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Case No. 8186

BRIEF OF RESPONDENTS

STATEMENT OF FACTS

Kenneth G. Scrivener is the deceased father of Gregory Scrivener, a minor six years of age. Gregory's mother was Ruth E. Scrivener whose marriage with Kenneth G. Scrivener terminated by divorce. Following

the divorce and on the 15th day of October, 1952, the said Kenneth G. Scrivener married one Shirlee S. Scrivener. A few months later, to wit, on the 3rd day of January, 1953, the said Kenneth G. Scrivener died as a result of an accident and left surviving him as his sole and only heirs at law his said son, Gregory, who was six years of age, and the said Shirlee S. Scrivener. The said Gregory Scrivener had never resided with nor made his home with the said Shirlee S. Scrivener.

Albert Scrivener and Mrs. Albert Scrivener are the surviving parents of Kenneth G. Scrivener, deceased, and the grandparents of Gregory Scrivener.

During his lifetime the said Kenneth G. Scrivener had taken out two life insurance policies on his life—one in the sum of $10,000.00 which was taken out while the said Kenneth G. Scrivener was in the Army, and the other policy in the face amount of $5,000.00 with the Prudential Life Insurance Company, the same being Policy No. 17655702. A photostatic copy of the Prudential Life Insurance Policy was introduced in the record and is made a part of the record on appeal (Exhibit 1). The cover sheet of this policy, among other things, contains the following information:

"Policy No.
17 655 702

Insured:
Kenneth G. Scrivener

The Prudential Insurance Company of America

Face Amount of Insurance:
$5,000.00

Policy Date:
June 20, 1949

Modified Whole Life Policy"

At the time of the death of the said Kenneth G. Scrivener both the $10,000.00 service policy aforementioned and the Prudential Life Policy were payable to the estate of the decedent. The sum of $10,000.00 was in due course paid under the service policy to the estate. The Prudential Life Insurance Company paid to the estate the sum of $9,995.99 computed as follows:

Amount of Policy No. 17655702		$5,000.00
Paid-up Additions		10.69
Premiums Deducted	$14.70	
Accidental Death Benefits		5,000.00
Total		9,995.99

(Exhibit 2)

All of the aforementioned facts were stipulated to by the parties in writing (R. 19, 20 and 21).

The said Kenneth G. Scrivener on the 2nd day of January, 1953, or one day prior to his fatal accident, made his last will and testament (R. 1 and 2), which was thereafter admitted to probate in the District Court of Salt Lake County, State of Utah, and the said Shirlee S. Scrivener was appointed executrix of the said last will and testament. The third paragraph of the decedent's last will and testament read as follows, to-wit:

"THIRD, I hereby give, devise, and bequeath to my parents, MR. and MRS. ALBERT SCRIVENER, or the survivor of them, of Rochester, New York, *my $5,000.00 life insurance with The Prudential Insurance Company of America, Policy 17655702,* to be held in trust for the uses and purposes hereinafter set forth:

> They, the said MR. and MRS. ALBERT SCRIVENER, or the survivor, as such trustees, shall have full power to manage and control the $5,000.00 *principal derived from said life insurance policy,* with the power to invest or reinvest same as they may see fit so to do for the purpose of educating, maintaining and supporting my son, GREGORY SCRIVENER, until such time as he shall reach the age of twenty-one years, at which time the said trustees are to pay over to my son, GREGORY, the balance, if any, of the $5,000.00, and after such payment, the said trustees shall then be discharged from any further liability on their part. PROVIDED, that if my parents predecease me, or that if they decease prior to the execution of said trust, I then request my brother, CLIFFORD C. SCRIVENER, of St. Louis, Missouri, be appointed substitute trustee, to be succeeded by my sister, MARY ELLEN WOODS of Rochester, New York, if need be."

Shirlee S. Scrivener as such executrix tendered to the said Mr. and Mrs. Albert Scrivener the sum of $5,000.00 in full, final and complete payment of the said bequest, claiming that was all that was due under the terms and provisions of the decedent's last will and testa-

ment. Albert Scrivener and his wife refused to accept said sum and claimed that they were entitled as trustees to the entire proceeds of said policy and filed a petition herein setting forth their claim (R. 5, 6 and 7). Upon the filing of said petition an order to show cause was issued and served upon the said Shirlee S. Scrivener, executrix, requiring her to show cause, if any she had, why as such executrix she should not be compelled to pay to Albert Scrivener and Mrs. Albert Scrivener as trustees for Gregory Scrivener the sum of $9,995.99, or the entire amount of the proceeds realized by the estate from the Prudential Insurance Company of America (R. 3). The said Shirlee S. Scrivener filed an answer to the petition (R. 8, 9, 10 and 11), and in due course the matter came on for hearing before the Honorable A. H. Ellett, Judge, at which time the matter was submitted on the stipulated facts aforementioned and upon a photostatic copy of the insurance policy with the Prudential Life Insurance Company aforementioned (Exhibit 1), and the insurance company's computation of its manner of payment (Exhibit 2). The lower court made and entered its order awarding to Albert Scrivener and Mrs. Albert Scrivener as trustees for Gregory Scrivener the entire proceeds of the Prudential Life Insurance policy in the sum of $9,995.99, all as more fully reflected in the Findings of Fact and Conclusions of Law (R. 12, 13, 14 and 15), and Judgment (R. 16 and 17).

It is from this Judgment awarding to Albert Scrivener and Mrs. Albert Scrivener as trustees for

Gregory Scrivener the entire proceeds of the Prudential Life Insurance policy that the executrix takes her appeal. As indicated by appellant's counsel, there is no dispute in the facts as all of the material facts were admitted by the stipulation or covered by the exhibits. The only question involved on this appeal is whether the lower court properly awarded to Albert Scrivener and Mrs. Albert Scrivener, trustees for Gregory Scrivener, the entire proceeds of the Prudential Life Insurance policy.

STATEMENT OF POINTS

POINT NO. I

THE WILL MADE A SPECIFIC BEQUEST IN TRUST FOR GREGORY OF THE PRUDENTIAL LIFE INSURANCE POLICY AND CARRIED WITH IT AS AN INCIDENT THERETO THE DOUBLE INDEMNITY PROVISION OF THE POLICY.

POINT NO. 2

THE DECEASED DID NOT CONSIDER THE CONTRACTS FOR LIFE INSURANCE AND DOUBLE INDEMNITY AS SEPARATE AND DISTINCT BUT MADE A SPECIFIC BEQUEST OF THE ENTIRE PROCEEDS OF THE POLICY IN TRUST FOR GREGORY.

POINT NO. 3

THE BEQUEST IN TRUST FOR GREGORY INCLUDED THE DOUBLE INDEMNITY BENEFIT.

POINT NO. 4

BY MAKING HIS ESTATE THE BENEFICIARY OF THE INSURANCE POLICY THE DECEDENT EVIDENCED NO INTENTION TO LIMIT THE AMOUNT TO GO TO GREGORY.

ARGUMENT

POINT NO. I

THE WILL MADE A SPECIFIC BEQUEST IN TRUST FOR GREGORY OF THE PRUDENTIAL LIFE INSURANCE POLICY AND CARRIED WITH IT AS AN INCIDENT THERETO THE DOUBLE INDEMNITY PROVISION OF THE POLICY.

The third paragraph of the decedent's will evidenced a clear and unequivical intent on the part of the deceased to make a specific bequest of the life insurance policy with the Prudential Insurance Company of America in trust for Gregory. At the time the decedent made his will he undoubtedly had before him the Prudential policy and the information contained on the cover sheet indentifying said policy. The policy was known as a life insurance policy. It was designated by a number and indicated the face amount of insurance at $5,000.00 and gave the name of the Prudential Insurance Company of America as the insurance company involved. In the third paragraph of his will the decedent identified the subject of his bequest by all of the foregoing information. The provision of the will read as follows:

> "I * * * give * * * to my parents * * * my *$5,000.00 life insurance with the Prudential Insurance Company of America, Policy No. 1765570?.*"

Certainly, the decedent could not have used more explicit information in describing the subject of his specific bequest.

Appellant argues that since he used the words "my $5,000.00 life insurance," that he intended to give the life insurance only and not the entire policy itself. We submit that the language in the will is not susceptible to any such interpretation; that the decedent made a specific bequest of the policy and described it by the only identifying data contained on the cover sheet of the policy itself. Frankly, we do not see how anyone could more accurately describe the policy than did the insured. The policy itself was identified as a life insurance policy in the face amount of $5,000.00 and bearing a particular number, all of which was incorporated by the decedent in his designation of the bequest.

Appellant further argues that the bequest is limited because in the trust provision of paragraph 3 reference is made to the $5,000.00 principal derived from the life insurance policy and payment to the son, Gregory, of the balance, if any, of the $5,000.00 after Gregory became 21 years of age. We do not construe this language as in any way limiting the specific bequest referred to in the earlier portion of the paragraph. The decedent simply did not have in mind the possibility of his dying in an accident and at the time he drew the will could not know he was going to die in an accident the very next day. He was simply using the figure of $5,000.00 as descriptive of the face amount of the policy. Certainly, the decedent could not with any accuracy have referred to the amount of the policy as being anything other than $5,000.00 or the face amount specified therein. He spoke of the

"*principal derived from said life insurance policy.*" It was therefore clear that he intended the principal to go in trust to his son. The sum of $9,995.99 was in fact "the principal derived from said life insurance policy." The lower court found no trouble in dealing with the trust provisions of the will. It correctly found that the will made a specific bequest of the entire policy including the accidental death benefit and that the whole amount derived from the policy was subject to the trust even though the decedent in his will did not at that time know that he would die in an accident and that the amount derived would in fact be $10,000.00.

We agree that intent should be gathered from a consideration of the whole paragraph, but in addition there should also be taken into consideration the fact that when the decedent drew his will, he had in mind protecting his son by a former marriage and his then wife. In this connection, at the time the decedent made his will he had two separate policies—one a $10,000.00 service policy, and the other the $5,000.00 Prudential Life Insurance policy in question. We believe that it was the insured's intent to give the Prudential Life Insurance Policy to his son, Gregory, and the proceeds of the other policy to his wife, and that this is clearly expressed in the will and in the specific bequest which he made of the policy to his son.

It is argued that the deceased only intended to give the $5,000.00 life insurance portion of the policy and not

the accidental death benefit. If the decedent had in mind any such distinction between the $5,000.00 face amount of the policy and the accidental death benefit, he certainly would have so indicated in his will. Had he intended the result which appellant would have this Court reach, he most assuredly would have written into the will that the accidental death benefits of the Prudential Life Insurance policy were not included in the bequest and either went to his wife directly or passed under the residuary clause of his will. The fact that he did not so specify conclusively indicates that he considered the policy as a whole and was making a specific bequest of that policy and any proceeds derived therefrom in trust for his son. The proceeds of the other policy in the principal amount of $10,000.00 of course passed to his second wife under the residuary clause of his will.

The fact that more than the $5,000.00 face amount was derived from the policy because of the accidental death benefit provision does not mean that the balance of the funds would not be impressed with any trust, because reading the will as a whole and considering the facts before the decedent at the time he made his will, it is clear that he was making a specific bequest of the policy and all of the proceeds derived therefrom and accordingly any proceeds received regardless of the amount are impressed with the trust, as the lower court indicated in its Findings of Fact, Conclusions of Law and Judgment.

If the appellant's argument were followed to its logical conclusion, some very unusual results would follow. Assume, for the purpose of argument, that the appellant's interpretation is correct. Then, assume further that during his lifetime the decedent had borrowed the sum of $2,500.00 on his life insurance. This would leave only $2,500.00 received from the life insurance proceeds of the policy. If the decedent intended only the life insurance proceeds to go under the provision of his will, then all that the son, Gregory, could receive in trust would be the sum of $2,500.00, and yet the trust refers to the sum of $5,000.00 upon which counsel for appellant places so much significance. How, then, could counsel's argument as to the bequest being only for the life insurance proceeds of $2,500.00 be reconciled with his argument that the use of the sum $5,000.00 in the trust shows that the bequest was to be $5,000.00. Any additional sum would certainly have to come out of the accidental death benefit under the appellant's argument. The two bases on which the appellant attempts to prove the decedent's intent are thus inconsistent when put to the test and would lead to opposite results. The only reasonable interpretation is that which the lower court placed upon the provision that the bequest was one of the entire policy and all of the proceeds derived therefrom.

POINT NO. 2

THE DECEASED DID NOT CONSIDER THE CONTRACTS FOR LIFE INSURANCE AND DOUBLE INDEMNITY AS SEPARATE AND DISTINCT BUT MADE A SPECIFIC BEQUEST OF THE ENTIRE PROCEEDS OF THE POLICY IN TRUST FOR GREGORY.

The insurance policy in question indicated that the total amount of premium during the first five years was $14.70, and further that the total amount of premium after the first five years was $28.10. The policy then contained a notation: "Extra premium for accidental means death benefit (included in total premiums) $1.30." (Exhibit 1). The premiums were payable quarterly.

Appellant in her brief states that the law is clear that the contract for double indemnity is separate and distinct from the contract for life insurance, although contained in the same policy. We cannot agree with this statement and the authorities do not bear out the appellant's conclusion.

Appellant quotes from 44 C.J.S. 1286 Sec. 336 in support of her proposition. However, appellant did not cite the entire quotation from C.J.S. on that subject. Following the sentence or portion thereof quoted by the appellant in her brief is the following:

> "But the rule is otherwise where the consideration for all such liabilities was one and the same premium, *and it has been held that a policy with such benefits did not constitute several contracts because a separate premium was charged*

for disability benefits where the premiums, although to some extent separable, were integral parts of a single policy. * * * An industrial policy providing for benefits for natural death and for benefits for death by accidental means is a single policy of life insurance, and must be considered as a whole." (Italics ours)

See also 29 Am. Jur. page 205, Sec. 189:

"A provision in a life insurance policy for disability benefits, which can be obtained only as a part of a policy of life insurance and survives only so long as the policy of life insurance continues in existence, cannot be regarded as an agreement independent of that for life insurance, made in exchange for an independent consideration, although, pursuant to a requirement of the insurance department, the policy provides that the total premium stated on the first page of the policy includes an annual premium of a specified amount for disability benefits."

See also the note to said section contained in the 1953 Pocket Part reading as follows:

"It is impossible to state broadly either that contracts evidenced by policies of life insurance with accident or disability features are entire, or that they are severable, or even to lay down any single test by which the question can be determined in every case. Thus, while in a number of cases life insurance policies with accident or disability features have been held or declared to be entire, and in a number of other cases such policies have been held or declared to be severable, it should be kept in mind that many decisions do not purport to go further than to hold that the par-

ticular policy before the court should be regarded as entire or severable in view of the particular language used therein or of the particular circumstances under which, or of the purpose for which, the question was raised."

See also *Rhine v. New York Life Insurance Company,* 273 N.Y. 1, 6 N. E. (2d) 74. In that case the policy provided that the total premium was $30.30 for life insurance and disability benefits and contained a provision that this premium "includes an annual premium of $2.96 for disability benefits." The court said:

> "It is true that the plaintiff's policy contains two promises which for some purposes and in some contingencies are separable. The promise of life insurance could be obtained without promise of additional disability benefits and for a premium or consideration fixed as the price of the promise of insurance alone; choice rested with the plaintiff whether the policy should include disability benefits for an extra premium, and choice still rests with the plaintiff whether the promise of additional disability benefits should be kept alive by the continued payment of the extra premium. The promise of life insurance would survive even if the promise of the additional benefits, and the extra premium demanded for the inclusion of that promise, should be excised from the policy. Though to that extent the promises are separable, they are none the less integral parts of a single policy.
>
> "The rules which govern the effect of a breach or of the illegality of one promise, which for some purposes is separate from other promises contained in the *same agreement,* have no appli-

cation here. We are concerned solely with the question of whether the defendant's promise of disability insurance constitutes an *independent agreement* made in exchange for a *separate premium,* though embodied in a policy which contains other promises. Concededly the promise of the disability benefits could be obtained from the company only as part of a policy of life insurance, and concededly it survives only so long as the policy of life insurance continues in existence. The test of the divisibility of a contract has been stated to be 'whether the parties assented to all the promises as a single whole, so that there would have been no bargain whatever if any promise or set of promises were struck out.' Williston on Contracts, Sec. 863. Since it is undisputed that the defendant would not have consented to the bargain for disability benefits unless it was made as a part of a policy for life insurance, and since the provision for disability benefits can survive only as part of the policy, it is difficult to understand how the provision for disability benefits can be regarded as an independent agreement made in exchange for an independent consideration.

"Policies of life insurance may contain different provisions for benefits based upon varying risks. The premium is always based upon a calculation of the anticipated cost of providing the promised insurance or benefits. We may reasonably assume that where one form of policy contains a promise of insurance or benefits which is not included in other forms, the premium provided for the policy containing the additional promise would include an extra premium for the additional promise even though the policy does not contain a statement to that effect. The premium fixed for

a policy containing a number of promises might thus represent the sum of the amounts fixed by calculation of each factor of cost; nevertheless all the promises would be given to the insured in exchange for payment of the total premium."

See also *Chastang v. Mutual Life Insurance Company of New York,* 65 N.E. (2d) 873 (Ohio), Re-hearing denied 68 N.E. (2d) 240, affirmed 71 N.E. (2d) 270. The court said:

> "The plaintiff contends that inasmuch as the semi-annual premium in the amount of $66.00 was broken down to show that $2.80 was the premium for the double indemnity benefit and $7.95 the premium for disability benefit, the court would be justified in concluding that the policy of insurance was separable. * * * The stipulation in the policy of the amount of the premium for the double indemnity benefit and for the disability benefits was made under instructions of the superintendent of insurance, so that if the policyholder wished to terminate the disability benefits feature he would be advised as to the amount of the premium which would be due on the life insurance policy alone. *We hold that the policy of insurance held by the plaintiff constituted one entire contract."* (Italics ours)

See also to the same effect *New York Life Insurance Company v. McCane,* 124 S.W.(2d) 1057.

See also 13 Appleman Insurance Law & Practice, Sec. 7422, page 115:

> "The calling of a life contract by one name or another does not change its character, since the

liability of the company is determined by the nature of the contract and not by its title. Nor does the addition of new features to a life policy divest it of its chief character or make it other than a life policy.

"* * * However, a policy may contain provisions for other benefits, such as those for injuries not resulting in death, sickness or accident benefits, or accidental death benefits without being removed thereby from the category of life insurance. The mere fact that a life policy may also include total disability benefits would not alter its character as life insurance. Such a policy cannot be considered purely an 'accident and health' policy within the purview of a statute excepting from its provisions accident and health policies."

In the case of *New York Life Insurance Company v. Davis,* 5 Fed. Supp. 316, cited at page 11 of appellant's brief, the insurance company brought a suit in equity to eliminate from three life insurance policies the disability and double indemnity provisions. The policies would all have been voidable in their entirety for fraud by reason of false answers to the medical part of the application but for the incontestability clause contained in each policy which read:

"This policy shall be incontestable after two years from its date of issue, except for nonpayment of premium and except as to the provisions and conditions relating to disability and double indemnity benefits."

The Court in that case correctly held under the incontestability clause that the insurance company could eli-

minate the disability and double indemnity provisions from the policy notwithstanding the fact that the policy as to the life portion was incontestable.

In *Anair v. Mutual Life Insurance Company,* 42 At. (2d) 423 (Vt.), 159 A.L.R. 547, cited at page 12 of appellant's brief, the insured had assigned all of her right, title and interest in the policy to a bank, following which the bank authorized the insurance company to pay to the insured the disability benefits of the policy. The insurance company sought to deny liability on the ground that the policy had been assigned to the bank. Quite reasonably, in that suit in an action against the company the contract was held to be divisible and the insured was properly permitted to recover for the disability benefits under the policy.

A similar situation was presented in *Armstrong v. Illinois Bankers Life Association,* 29 N.E. (2d) 415 (Ind.) 131 A.L.R. 769, cited at page 13 of her brief, and here again the policy was construed against the company to permit an action to the insured for his disability benefits, notwithstanding the fact that the life policy itself had been assigned to his wife. It is interesting to note, however, that even in that case the court does not go as far as counsel in his brief and say that the law is clear that the contract is always severable. We quote as follows from the court:

> "In determining whether the questioned instrument shall be considered as constituting but one entire contract, or as constituting two or more

> separate and independent contracts, courts and text book writers have laid down several rules to guide us. It is said—primarily, the question of whether a contract is entire or severable is one of intention, to be determined from the language which the parties have used, and also the subject matter of the agreement. Another inquiry is, whether the parties reached an agreement regarding the various items as a whole or whether the agreement was reached by regarding each item as a unit. 2 Williston on Contracts, Sec. 863. Another important factor in the determination of the question is whether the consideration is stated to be given for each part as a separate unit or whether there is a single consideration covering the various parts. * * * A contract is entire when by its terms, nature, and purpose, it contemplates and intends that each and all of its parts and the consideration shall be common to each other and interdependent. On the other hand, it is the general rule that a severable contract is one which in its nature and purpose is susceptible of division and apportionment.' "

In applying the rules laid down in that case, certainly the insured intended and treated this contract as a whole. In fact, he could not have bought the double indemnity benefits separate and apart from the life insurance contract. He could have bought the life insurance without the double indemnity benefits, but the double indemnity benefit was an integral part of the life insurance and could not stand alone or be purchased separate therefrom. As stated by the New York Court in the case of *Rhine v. New York Life Insurance Company,* supra, all

of the promises were given by the insurance company in exchange for payment of the total premium. Certainly, the insured as well as the company in the instant case intended and contemplated that both the life insurance benefits and the double indemnity provision were common and interdependent.

In the case of *Russo v. New York Life Insurance Company,* 128 S. 434 (Miss.) 69 A.L.R. 883, cited at page 14 of appellant's brief, the life policy contained a provision for sick benefits and also provided that the right of action for any sick benefits on the death of the insured accrued to the beneficiary. The insured was sick prior to his death and entitled to sickness benefits under the policy which he did not claim. Following his death, the widow sued for the life portion only of the policy and recovered from the company and then brought a separate suit to recover for the disability provisions. We think the court in that case properly held that the widow was entitled to recover also under the disability provisions since she had not recovered the same under the former action and was entitled to it under the policy. The court held that the one cause of action accrued prior to the other and was separate and distinct and that two actions could be maintained. We do not disagree with this finding, but do not believe that the case has any merit whatsoever in determining the issues involved in the instant case.

The last case cited by appellant in her brief is *Chatanooga Sewer Pipe Works v. Dumler,* 120 S. 450 (Miss.) 62 A.L.R. 999, in which the Mississippi court held that the money received by the insured under a life policy for disability benefits was not exempt under a statute which provided that the proceeds of a life insurance policy not exceeding $5,000.00 should be exempt from the debts of the decedent. There are, however, numerous cases holding to the contrary under the same set of facts, so that there is no unanimity among the authorities in this regard.

See *Fox v. Swartz,* 235 Minn. 337, 51 N.W. (2d) 80, 30 A.L.R. (2d) 739. We quote from the facts as given in the summary of the decision at the beginning of the case:

> "The cash surrender value and accumulated dividends of a fifteen-year endowment policy were sought by an assignee of a judgment against the insured to be subjected to the execution involved in the instant proceeding. The policy provided for payment of a stated sum to the surviving wife or son of the insured in the event of the latter's death prior to the maturity, but was payable at maturity to the insured, who reserved the rights to change the beneficiaries and to have dividends paid in cash, or applied to the payment of premiums or to the purchase of paid-up additional insurance, or left with the insurer as an interest-bearing savings fund payable upon death, maturity, or prior withdrawal. The policy had not yet matured and the withdrawal options had not been exercised by the insured. By statute, the beneficiaries of life insurance are 'entitled to its

proceeds against the creditors and representatives of the person effecting the same.' A provision of the statute as to premiums paid in fraud of creditors was not involved in the case.

"Vacation of the levy of execution was approved by the Supreme Court of Minnesota, in an opinion by Matson, J., which, ruling that the statute was not unconstitutional as creating an unreasonable exemption, or a discriminatory classification as to savings and investments, held that, prior to its maturity, the endowment policy had all the characteristics of life insurance and was within the statutory exemption from claims of creditors; and that the cash surrender and dividend withdrawal options of the insured were purely personal to the insured and, where unexercised, were unavailable to creditors."

Without taking more time to review the cases on this point, we refer the court to the annotation found at 30 A.L.R. (2d) 751, wherein numerous courts have held that policies of endowment insurance both prior to maturity and after maturity have been construed as life policies within the terms of the exemption laws.

See also *American Trust and Banking Company v. Lessly,* (Tenn.) 106 S.W. (2d) 551, 111 A.L.R. 59. In that case the court held that the proceeds of a policy of insurance against death by accident were within the operation of the statute which provides that "any life insurance effected by a husband on his own life shall, in case of his death, inure to the benefit of his widow and child without

being in any manner subject to his debts," holding that in its broader sense, the term "life insurance" included accident insurance.

There is therefore a sharp conflict in the authorities on the question whether a life insurance policy containing double indemnity provision in case of accidental death is one contract or in fact two separate contracts. Most of the cases are decided upon the particular facts involved in each case. In cases wherein an insurance company is a party, the courts are more generally inclined to find the contract severable, if necessary, to do justice between the insured and the company, and prevent the insurance company from defeating a claim by a technicality.

Appellant argues in her brief that the contract was severable and that the insured only intended to give the life insurance portion because of the severable nature of the contract and the fact that he referred to "life insurance." In the first place, as we have seen, the premise upon which counsel bases his argument is not sound as there is a sharp conflict in the authorities, and the law is not as clear as counsel would intimate. In the second place, the question, as we see it, is not whether the contract was in fact one or two separate contracts, but solely what the decedent intended when he made his will. His intent is to be gathered from the language in the will, considered under the surrounding circumstances, and the fact that he owned two life insurance policies—

one a service policy in the sum of $10,000.00, and the other a $5,000.00 life policy with double indemnity provision with the Prudential Insurance Company.

Certainly, if the courts cannot agree on the principle whether the contract is to be considered divisible or not, it is unreasonable to ascribe to the decedent a knowledge of the law and all of the various decisions in connection therewith and to say that he acted on the assumption that the contract was divisible. Such argument falls for another reason. If the decedent recognized the distinction that some of the courts had made between the life insurance portion of the policy and the double indemnity portion thereof, he would have shown such distinction by the wording in his will. Any man who recognized such a technical distinction, would not have left the matter in doubt in his will. To a person recognizing such a technical distinction it would have been a simple thing for him to provide that he was bequeathing the life insurance portion only of his policy and that any benefits under the double indemnity feature were to pass under the residuary clause of his will. The fact that the decedent did not do this is clear proof that he did not have any distinction in mind. We might add that in our opinion he had no idea that he was going to die by accidental death. He had two policies of insurance which he desired to cover in his will. In making the specific bequest of the one policy in trust for his son he described it in the only way that an ordinary and reasonable man would have done. He used the policy number and name of the company,

the face amount of the policy and referred to it as what it was known to him and other people generally as a life insurance policy. There can be no doubt that he intended to give the policy or the entire proceeds thereof in trust to his son.

POINT NO. 3

THE BEQUEST IN TRUST FOR GREGORY INCLUDED THE DOUBLE INDEMNITY BENEFIT.

Certainly, the decedent did not know that he was going to die in an accident. He undoubtedly gave no thought to the double indemnity provisions of his policy. He had before him two policies—the $10,000.00 service life insurance policy, and the $5,000.00 Prudential Life policy with the double indemnity provision. We believe it is clear that he intended to give the Prudential Life policy or all of the proceeds therefrom to his son in trust and that the $10,000.00 service policy should pass under the residuary clause to his wife.

Counsel cites at page 16 of his brief the case *In re: Campbell's Estate,* 27 Utah 361, 75 Pac. 851, to the effect that the deceased must have specific property in mind and the property must be so described as to be capable of identification. We have no quarrel with the Utah case. In that case the deceased made some provision in his will with reference to the proceeds of mines which were not in existence when the will was made and the portion bequeathed could only arise, and as such become property, after the death of the testator. The court cited several

cases with approval defining a specific legacy and among other things quoted with approval from Underhill on Wills, Volume 1, Section 407, reading as follows:

> "A specific legacy is a gift of a particular thing or of money, specified and distinguished from all things, and which at the execution of the will is owned by the testator, as of a horse, or a piece of plate, or of money in a purse, stocks of a corporation, and the like."

Since the property attempted to be disposed of in that case was not in existence at the time, the court held that it was not a specific legacy and could not pass. However, the rule when applied to the instant case is otherwise. The Prudential Life Insurance policy with its double indemnity feature was in existence both at the time the deceased drew his will and at the time of his death. He described the subject particularly and with as much definiteness as it was possible for him to do, giving the number of the policy, the face amount of the policy and the name of the company, and referring to it as life insurance, which was the designation in fact of the policy. Frankly, we do not see how the decedent could have described the subject of his bequest with more particularity and it certainly meets all of the tests of a specific bequest as laid down by the Utah court in the case cited by counsel.

A gift of a life insurance policy carries with it all of the accretions as an incident to the policy itself. See

Matter of Gans, 60 Misc. 282, (N. Y.), affirmed on appeal on other grounds in 195 N.Y. 346, wherein the court said:

> "By the fifth codicil testator gave to his brother 'Joseph Gans my life insurance of ten thousand dollars in the Manhattan Life Insurance Company of the City of New York.' It appeared that he never owned a policy in the Manhattan Life Insurance Company, but he had at the time of his death a ten thousand dollar policy in the Mutual Life Insurance Company. I am of the opinion that said last-named policy was a specific legacy, bequeathed by the testator to his said brother, and that it *carried with the gift all of its accretions.*" (Italics ours)

There are a number of cases in which it has been held that the specific bequest of a mortgage carries with it interest accrued prior to the death. In particular see *Matter of Athans,* 94 Misc. 43, (N.Y.) and *In re Amans Estate,* 5 N.Y. Supp. 2nd, 962. In the case at bar the double indemnity provision of the policy was an incident to the life policy and passed to the beneficiary under the specific bequest of the policy itself.

Appellant also cites the case of *Waters v. Hatch,* 79 S.W. 916 (Mo.), at page 16 of her brief. In that case the decedent held two certificates in the Bankers Life Insurance Company of $2,000.00 each and directed that when the money was paid that certain amounts should be paid and certain parties given money totaling $4,000.00 or the face amount of the certificates. Accumulations on the policy in the amount of $190.00 in excess of the amount

stated in the will were paid. The court held that Frank Hatch who was bequeathed the bal. of $100.00 was not entitled to the additional accumulation because it was a specific bequest of money. It is apparent from reading the provisions of the will that at no time did the decedent in that case attempt to give the certificates themselves but was giving the money, making specific money bequests, and erroneously computed the money to be derived. We submit that a different result would have been reached in that case had the decedent made a specific bequest to his son, Frank, of the certificates in question with the provision that out of the proceeds should first be paid the items to the widow and daughters referred to. Had the deceased made such a specific bequest of the certificates themselves, the accumulations would have passed to the son, Frank. However, having bequeathed only the money, it was clear that the accumulations could not pass under the clause in the will.

The case cited by counsel is interesting for another reason. In another clause in the will the testator bequeathed 60 shares of stock of Carthage National Bank, which was all the stock the decedent owned in the bank, and in the next clause bequeathed 20 shares of Carthage National Bank stock to someone else. As a matter of fact, the decedent owned 20 shares of stock in the Central National Bank of Carthage in addition to the 60 shares in the Carthage National Bank. The court in that case held that the latter bequest should be construed to refer to the Central National Bank stock, saying:

> "By a mistake he spoke of them as being shares of stock in the Carthage National Bank, instead of in the Central National Bank of Carthage. By following the letter of the will and shutting the eyes to the intention of the testator, this provision of the will would be nullified. But, if the intention is observed, the clause is full of meaning. It is the duty of the court to give such a construction to a will as will effectuate the manifest intention of the testator as discerned from the whole will itself, and not to construe it as to cause any of the provisions to perish."

In this case it is apparent that the decedent intended to make a specific bequest of the Prudential Life Insurance policy with all of its incidents in trust for his son, and that the other policy should pass under the residuary clause of his will. The fact that in the trust provisions of the will he refers to the proceeds as being $5,000.00 was only because the insured did not know that he was going to die by accidental means and was not thinking of the double indemnity provisions. Such fact, however, should not prevent the insured's intent from being given full force and effect and upholding the specific bequest of the entire policy including the double indemnity provision in trust for his son.

POINT NO. 4

BY MAKING HIS ESTATE THE BENEFICIARY OF THE INSURANCE POLICY THE DECEDENT EVIDENCED NO INTENTION TO LIMIT THE AMOUNT TO GO TO GREGORY.

Appellant argues that the various changes made in the beneficiary under the policy, and in particular the change made on September 11, 1952, making the proceeds payable to the executor and administrator indicated an intent on the part of the testator to limit the amount which would go to his son. It is claimed that this intent is shown because the decedent, in making his estate the beneficiary of the policy, subjected the proceeds to the claims of creditors and to other beneficiaries named in the will. This is not true because the bequest in trust to the son was a specific bequest. The residue of the estate was charged with the claims of creditors.

No intent can be shown by reason of the change of beneficiaries. The reason for the original change in beneficiary was undoubtedly because of Kenneth's divorce from his first wife. Why the policy was subsequently endorsed to name the estate as beneficiary, will probably never be known any more than the decedent's reason for making the estate the beneficiary in his $10,000.00 service life policy. The fact remains he had two policies both payable to the estate and the intent clearly was to give one policy to his son, and the proceeds of the other to his second wife, as the residuary beneficiary.

CONCLUSIONS

Like appellant's counsel, we have been unable to find any case which is exactly in point. We submit,

however, that the only reasonable interpretation of the will was that adopted by the lower court, namely, that the insured intended the Prudential policy with its double indemnity provisions to go in its entirety in trust to his son and for the other policy to pass under the residuary clause of the will to his wife.

We submit that there was no error in the judgment made and entered by the lower court and that the same should be affirmed.

Respectfully submitted,

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